

KENDALL L. PIERCE
Claimant

MEC COMPANY

Respondent

AND

LIBERTY INS. CORP.

Insurance Carrier

ORDER

ISSUES

Following a preliminary hearing the Administrative Law Judge (ALJ) specifically concluded the respondent (through its carrier) interfered with the authorized treatment in order to avoid providing disk replacement surgery, a procedure that had been recommended by two physicians, both authorized to treat claimant. He then authorized Dr. Tomecek, a physician respondent had authorized earlier, to serve as the authorized treating physician for all tests and referrals including disk replacement surgery if the doctor believes it is necessary.¹

The respondent alleges the ALJ exceeded his authority designating Dr. Tomecek as the treating physician rather than allowing respondent to designate a list of three physicians from which claimant could choose to direct his care. At no time has respondent refused to provide treatment. Thus, respondent argues that the ALJ's authority is limited

¹ ALJ Order (Jan. 17, 2006).

to that under K.S.A. 44-510h(b), and that he exceeded his jurisdiction by taking it upon himself to designate Dr. Tomecek as the treating physician.

Claimant maintains the Board has no jurisdiction to review this matter as compensability is not in dispute. And even if jurisdiction is found based upon an allegation the ALJ exceeded his authority, the ALJ acted appropriately in this matter and his preliminary hearing order should be affirmed.

The only issue to be decided in this appeal is whether the ALJ exceeded his jurisdiction in designating Dr. Tomecek as the treating physician.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant suffered a compensable injury on May 12, 2004 when he fell off a ladder and injured his low back. His initial treatment was conservative, but after a failed attempt to return to work, he again sought treatment with the then-authorized treating physician, Dr. Tomecek. Following an examination and diagnostic tests, Dr. Tomecek concluded that claimant's severe and ongoing discogenic low back pain and radiating pain into his legs might best be resolved by a L4-5 Charite disk replacement.

Dr. Tomecek explained his recommendation as follows:

Mr. Pierce has severe discogenic low back pain. He has some radicular leg pain, but it[']s far worse in his back. At his age, I think he is at high risk of adjacent level disk degeneration if we fuse his spine. Also, since he is having mostly back pain and left paraspinal pain, I am concerned that he is not going to respond well to a discectomy because patients that do well with discectomies primarily have radicular pain from [a] pinched nerve. He does not have a fully herniated disk, and he does not have sciatica as such. He has mainly discogenic back pain, and most patients actually have slight worsening of their back pain with a simple discectomy. Also he does moderate to heavy manual labor as a welder; and I think he needs both decompression and stabilization of his spine which the artificial disk can provide. Since he will have persistent motion with the artificial disk, it is less likely that he will have adjacent level disk degeneration and require further surgeries. . .He is a perfect candidate considering his age and health and the fact that he is not a smoker. . . .

. . .I feel it is a medical necessity that Mr. Pierce has surgery . . .Also, the artificial disk is a similar cost to a lumbar fusion and so hopefully with it being a similar cost

up front and a lower risk of adjacent level and future needs for surgery it will be extremely cost effective in the workers compensation arena.²

This recommendation was made in March 2005.

Respondent referred claimant to Dr. Wesley Griffitt, a neurosurgeon in Kansas City, for a second opinion. Dr. Griffitt recommended a discogram for purposes of diagnosis and following that test, ultimately concluded claimant was a candidate for the lumbar disk replacement procedure recommended by Dr. Tomecek. This recommendation was formally made in August 2005.

Respondent then referred claimant to Dr. John Ciccarelli who saw claimant in October 2005. He reviewed all of the related records and test results and opined that claimant should not have the disk replacement. Rather, he recommended claimant have a lumbar decompression and discectomy at the L4-5 level. Dr. Ciccarelli explained that the disc replacement procedure would do nothing to address claimant's leg pain which he viewed as significant. He further explained that the disk replacement procedure was new, only recently approved by the FDA and as of yet, revisions were unlikely. For these reasons, he recommended against the procedure.³

The parties then proceeded to a preliminary hearing. There is no dispute as to the compensability of this accident. The sole issue is whether the ALJ inappropriately designated a physician to direct claimant's treatment rather than allow respondent to provide a list of three physicians to direct claimant's care. The claimant testified that he had considered his options and was ready to proceed with the procedure recommended by Drs. Griffitt and Tomecek. Respondent argued that the disk replacement procedure was simply unproven and would pose far too great a risk. For that reason, respondent indicates it transferred claimant's care to Dr. Ciccarelli.

In response, claimant contends respondent merely "shopped" for a physician to provide a favorable opinion. And for that reason he asserts that the ALJ appropriately designated Dr. Tomecek as the treater. Simply put, Dr. Tomecek was the designated physician until he issued an opinion respondent did not accept.

The Board must first consider whether it has jurisdiction to consider this matter. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

² P.H. Trans., Cl. Ex. 2 at 2 (Dr. Frank H. Tomecek's Nov. 18, 2005 letter).

³ Dr. Ciccarelli was deposed, but claimant's counsel did not appear at this deposition. While a motion to quash was filed, claimant's counsel did nothing to bring that issue before the ALJ before the deposition. At the preliminary hearing the ALJ admitted the deposition into evidence along with the exhibits referred to by Dr. Ciccarelli.

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.⁴

Here there is no dispute that compensability is in dispute. Instead, respondent alleges the ALJ exceeded his jurisdiction when he designated Dr. Tomecek as the treating physician. Respondent contends the had no authority to do so as it was providing treatment to claimant. And if Dr. Ciccarelli's treatment was unsatisfactory, under K.S.A. 44-44-510h(b)(1), then the ALJ was only authorized to require respondent to designate a list of three physicians from which claimant could select one to direct his care.

The Board has considered this matter and finds the ALJ did not exceed his jurisdiction and his preliminary hearing Order should be affirmed. Although the Board does not find, as did the ALJ, that the respondent or more accurately, the carrier, went so far as to interfere with the claimant's care, it does appear that respondent continued to redirect claimant's care until such time as it achieved a specific opinion. As a result, claimant's care has been delayed for nearly a year. Two physicians, both of which were designated and authorized by respondent, have recommended claimant have the disk replacement procedure. Claimant is willing to have the suggested procedure, even though there are significant risks associated with this new procedure. Only respondent and the last physician it sought out are hesitant about the procedure. Under these circumstances, the Board finds the ALJ did not exceed his jurisdiction in designating Dr. Tomecek as the treating physician, inasmuch as he was originally the treating physician and he is authorized to perform the procedure he has recommended.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Thomas Klein dated January 17, 2006, is dismissed.

⁴ See K.S.A. 44-551.

IT IS SO ORDERED.

Dated this _____ day of March 2006.

BOARD MEMBER

c: Kala A. Spigarelli, Attorney for Claimant
James P. Wolf, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

The Board has considered this matter and finds the ALJ did not exceed his jurisdiction. Although the Board does not find, as did the ALJ, that the respondent or more accurately, the carrier, went so far as to interfere with the claimant's care, it does appear that respondent continued to redirect claimant's care until such time as it achieved a specific opinion. As a result, claimant's care has been delayed for nearly a year. Two physicians, both of which were designated and authorized by respondent, have recommended claimant have the disk replacement procedure. Claimant is willing to have the suggested procedure, even though there are significant risks associated with this new procedure. Only respondent and the last physician it sought out are hesitant about the procedure. Under these circumstances, the Board finds the ALJ did not exceed his jurisdiction in designating Dr. Tomecek as the treating physician, inasmuch as he was originally the treating physician and he is authorized to perform the procedure he has recommended.

WHEREFORE, it is the finding, decision and order of the Board that the respondent's appeal of the Order of Administrative Law Judge Thomas Klein dated January 17, 2006, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of March 2006.

BOARD MEMBER

c: Kala A. Spigarelli, Attorney for Claimant
James P. Wolf, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director